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INSIGHT

Reissued Labor Department Rule Tests Congressional Review Act Ban on Promulgating "Substantially the Same" Rules

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On November 5, 2018, the Department of Labor published a proposed rule in the *Federal Register* on the states' ability to drug test certain unemployment compensation (UC) applicants. The proposed UC drug testing rule is a reissued version of a rule that the 115th Congress disapproved in 2017 under the Congressional Review Act (CRA). That rule had been issued by the Obama Administration on August 1, 2016, but was disapproved by P.L. 115-17, which President Donald Trump signed into law on March 31, 2017.

Notably, this is the first time an agency reissued a rule after the original version was disapproved under the CRA. No Administration appears to have seriously considered reissuing the one rule that was disapproved prior to the 115th Congress, and none of the other 15 rules that have been disapproved in the 115th Congress have been reissued thus far.

When a rule is disapproved under the CRA, the rule may not take effect or continue in effect, and, furthermore, the agency may not reissue the rule in "substantially the same form" or issue a "new rule that is substantially the same" as the disapproved rule unless Congress provides subsequent statutory authorization. Congress has not provided additional authorization since the UC drug testing rule was disapproved. Thus, DOL reissued the rule under the same authority as the disapproved rule, Section 2105 of P.L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012. In so doing, the agency made clear that it was attempting to reissue the rule in a form that was sufficiently different from the disapproved rule so as not to violate this provision of the CRA. In the preamble to the reissued rule, DOL stated the following: "To comply with both the mandate to issue regulations [under the Middle Class Tax Relief and Job Creation Act], and the CRA prohibition on reissuing the rule 'in substantially the same form,' the Department has carefully considered the Act, the 2016 Rule, and the congressional notice of disapproval."

The CRA does not define "substantially the same." Whether a reissued rule is "substantially the same" as the disapproved rule is likely to depend upon the specific circumstances surrounding the rule, such as whether the rule was required by statute (as was the case with the UC drug testing rule) and how much discretion the agency has. During floor consideration of the disapproval measure for the UC drug testing

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rule, House Ways and Means Committee Chairman Kevin Brady, who was also the sponsor of the joint resolution of disapproval, stated that the UC drug testing rule issued by the Obama Administration had been inconsistent with congressional intent because the rule was written too narrowly, impairing the ability of states to implement their own requirements for drug testing. In the preamble to the newly reissued rule, DOL acknowledged this concern: "In this NPRM, the Department now proposes a substantially different and more flexible approach to the statutory requirements than the [disapproved] 2016 Rule, enabling States to enact legislation to require drug testing for a far larger group of UC applicants than the previous Rule permitted."

The CRA does not specify who is to decide whether a reissued rule is "substantially the same." It is possible that Congress might be ultimately responsible for making that determination, rather than a court: the CRA contains a prohibition on judicial review, stating that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." This provision has generally been interpreted by courts to mean that they may not consider any claims under the CRA, although the "substantially the same" prohibition has not been tested in a court. Should the prevailing judicial interpretation of the CRA's judicial review provision hold, a court would be unlikely to strike down the reissued UC drug testing rule on the basis that it violates the "substantially the same" prohibition in the CRA. A number of commentators have argued, however, that the CRA's judicial review provision would not necessarily bar a court from reviewing whether a rule is "substantially the same" as a disapproved rule.

If courts continue to bar all judicial challenges under the CRA, Congress would arguably be the sole arbiter of whether the reissued rule clears the "substantially the same" standard. Upon finalizing the new version of the rule, DOL would be required to submit it to Congress under the CRA, and Members would have the opportunity once again to introduce and act on resolutions of disapproval under the CRA. If Congress does not disapprove the rule, and if the prevailing interpretation of the CRA's prohibition of judicial review holds, the rule would likely take effect—arguably giving Congress's implicit acceptance of the reissued rule. Thus, the possibility of future action in Congress, in a sense, could be considered an enforcement mechanism for the "substantially the same" prohibition.

Once the newly reissued UC drug testing rule is finalized, however, enactment of a CRA resolution of disapproval overturning it may be difficult. Enactment of a CRA resolution of disapproval requires either passage by both chambers of Congress and the signature of the President or an override of the President's veto, which would require a two-thirds majority in both chambers. The President may be unwilling to sign a resolution of disapproval overturning a rule issued by his own Administration. Thus, one might expect that Congress would need to override the President's veto if it wanted to disapprove the reissued rule, necessitating a supermajority in both houses.

For more information on the CRA, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*. For a discussion of policy developments related to the UC drug testing rule, see CRS Insight IN10909, *Recent Legislative and Regulatory Developments in States' Ability to Drug Test Unemployment Compensation Applicants and Beneficiaries*, by Julie M. Whittaker and Katelin P. Isaacs.

Author Information

Maeve P. Carey
Specialist in Government Organization and Management

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